

## **SUMMARY OF THE KEY STEPS FOR CARRYING OUT THE SECTION 106 REVIEW PROCESS IN INDIANA (UPDATED AS OF 08/24/04)**

### **INTRODUCTION**

Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f) and the Section 106 regulations (36 C.F.R. § 800 as revised effective August 5, 2004) require that any Federal agency or its delegatee having jurisdiction over a project that will be funded or licensed by that Federal agency or its delegatee take into account the project's effect on historic properties and give the Indiana State Historic Preservation Officer ("SHPO") and another Federal agency, the Advisory Council on Historic Preservation ("Council"), a reasonable opportunity to comment on the project. An historic property is any district, building, structure, object, or site that is either listed in or eligible for the National Register of Historic Places.

Unlike all other Federal agencies, the U.S. Department of Housing and Urban Development ("HUD") has delegated its responsibility under Section 106 to local governments that receive Community Development Block Grant funds from HUD, either directly or through grant programs such as the Indiana Department of Commerce's Community Focus Fund (ACFF≅) or programs administered by the Indiana Housing Finance Authority ("IHFA"). Therefore, the local government that receives or hopes to receive such a grant bears the responsibility of ensuring that the Section 106 process is completed, usually before the project begins. Consequently, all references to the "delegatee" specifically refer to those local governments legally delegated by HUD for certain HUD programs. The following discussion refers to certain responsibilities of the Federal agency or its delegatee.

### **STEP 1: INITIATING THE SECTION 106 REVIEW PROCESS**

The Federal agency or its delegatee must determine whether the proposed action is an undertaking as defined in 36 C.F.R. § 800.16(y), and, if so, whether it is a type of activity that has the potential to cause effects on historic properties per 36 C.F.R. § 800.3. If the Federal agency or its delegatee has determined that the undertaking is the type of activity that has the potential to cause effects on historic properties, then the Federal agency or its delegatee needs take steps to involve the public and identify the appropriate officers who need to be involved in the process.

*"Consulting parties"* where appropriate, must be invited by the Federal agency or its delegatee to participate in the consultation process. It is the Federal agency or its delegatee's responsibility, in consultation with the SHPO, to identify consulting parties and formally grant specific parties the ability to participate in consultation at the beginning of the review process. The SHPO automatically participates in consultation and special invitation is not needed.

An initial submission to the SHPO should include a letter from the Federal agency or its delegatee identify the contact names and addressed of consulting parties, if any, who have been invited and authorized by the Federal agency or its delegatee to participate in consultation. If no additional consulting parties will be participating, then provide a brief explanation of why (i.e. the nature or scope of the project, a written or lack of reply to an invitation by a designated time, etc.) Be advised that the naming of consulting parties at the beginning of the review process *does not preclude* the invitation of additional consulting parties once the review process has been initiated. Applicants for Federal assistance, permits, licenses or other approvals are entitled to participate as consulting parties as long as they are invited to do so. Ultimately, the Federal agency or its delegatee has the role of deciding who may participate as consulting parties. *Moreover, the SHPO may consult with an applicant other than a formal delegatee acting in the place of the Federal agency, only where the applicant has received express, written authorization from the Federal agency or delegatee and a copy of the authorization document has been provided to the SHPO.*

## STEP 2: IDENTIFYING HISTORIC RESOURCES

The current regulations set forth that the Federal agency or its delegatee “shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey” (36 C.F.R. § 800.4 [b][1]). Although this step remains largely unchanged from the former regulations, recent modifications include a greater emphasis upon the documentation of the steps that must be followed by the Federal agency or its delegatee to identify historic resources and specific flexibility measures for the Federal agency or its delegatee to carry out the identification process. It is important to gather information for the evaluation of all resources within the area of potential effects (see definition below), especially those resources that will be affected. The Federal agency or its delegatee is entitled to enlist the services of consultant to assist with the identification process. However, *a consultant must have received express, written authorization from the Federal agency or its delegatee to act on its behalf to gather historic information and a copy of the authorization document must have been submitted to the SHPO prior to or at the commencement of consultation.*

### Determining the scope of identification efforts through the area of potential effects

The Federal agency or its delegatee also needs to determine the *area of potential effects*, which means the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist. The scale and nature of an undertaking help to determine the appropriate boundaries of the *area of potential effects*. It is especially important to note that the area of potential effects *is not influenced by the pre-existing awareness of historic or non-historic resources*. Defining the area of potential effects is the first step for determining the scope of identification efforts, and needs to be established before one begins to seek information to assess the potential historic properties. Although defining the area of potential effects was part of the former review process, it often went unspoken or unwritten unless a memorandum of agreement was prepared. To define the area of potential effects, one must take into account effects that are *direct or indirect, cumulative, later in time, or at a distance*. Once a good faith effort has been made to define the area of potential effects, then it is necessary to consult with the Indiana SHPO. The Federal agency or its delegatee is also entitled to enlist the services of an authorized consultant to assist in this step.

### Evaluating historic resources

Below, we have listed some of the most heavily used sources to help the Federal agency, its delegatee, or the authorized consulting parties evaluate historic resources:

- a) The National Park Service (“NPS”) maintains a database list of all those properties that are currently listed in the National Register of Historic Places. This information is accessible through the NPS website ([www2.cr.nps.gov/nr/](http://www2.cr.nps.gov/nr/)).
- b) The NPS’s *National Register Criteria for Evaluation* are used for considering whether a property is eligible for inclusion in the National Register. The criteria are found in the publication entitled National Register Bulletin 15, which may be obtained by writing to the National Register of Historic Places, National Park Service, U.S. Department of Interior, Post Office Box 37127, Washington D.C. 20013-7121.
- c) About two-thirds of the counties in Indiana have been surveyed to identify potential historic buildings, structures, objects, and districts. Furthermore, the results of the most of the surveys have been published in Interim Reports. Although some of the Interim Reports are available for purchase through the Historic Landmarks Foundation of Indiana at (317) 639-4534, others are out of circulation. However, a complete set can be found at the Indiana State Library in Indianapolis and major college and university libraries throughout Indiana. Also, many of the Interim Reports can be found at local libraries and historical organizations.
- d) Historic preservation organizations and county historians may also have historical information on a particular resource or area. For a list of contact names, addresses, and telephone numbers, please check the website of the Indiana Historical Society ([www.indianahistory.org](http://www.indianahistory.org)).
- e) Other sources that might be useful for identifying potential historic or archaeological resources include: Sanborn maps (available for reference at the main library of Ball State University or the Geography Library at Indiana University), U.S. Geological Survey maps, old atlases, census information, local, county or regional histories and prehistories, and other records indicating previous land use.

## Documenting findings

After evaluating the historical significance of the properties within the area of potential effects, the Federal agency or its delegatee is supposed to provide documentation of its determination and findings to parties specified in the Federal regulations *and* ensure that a determination, finding or agreement is supported by sufficient documentation to enable any reviewing parties to understand its basis pursuant to 36 C.F.R. § 800.11(a).

## No historic properties affected

In the event that the Federal agency or its delegatee finds that *no historic properties will be affected*, then the Federal agency or its delegatee shall:

- a) Notify the SHPO of its findings and provide the SHPO with *required* documentation pursuant to 36 C.F.R. § 800.11(d).
  - 1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;
  - 2) A description of the steps taken to identify historic properties, including as appropriate, efforts to seek information; and
  - 3) The basis for determining that no historic properties are present or affected.
- b) Notify all consulting parties of the finding and make the above documentation available for public inspection.

## Historic properties affected

In the event that the Federal agency or its delegatee finds that there are *historic properties which may be affected* by the undertaking, or the SHPO disagrees with a finding that no historic properties will be affected, then the Federal agency or its delegatee shall:

- a) Notify all consulting parties and invite their views on the effects
- b) Proceed with the assessment of adverse effects

## STEP 3: ASSESSING EFFECTS ON HISTORIC RESOURCES

If the Federal agency or its delegatee finds that there are historic resources within the area of potential effects that *may be affected*, then the Federal agency or its delegatee is responsible for applying the criteria of adverse effect for those properties in consultation with the SHPO and other consulting parties. The Federal regulations state that an adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of an historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Examples of adverse effects are found at 36 C.F.R. § 800.5(a)(2).

## Finding of no adverse effect

If the Federal agency or its delegatee proposes a finding of no adverse effect and there is agreement, then it shall notify the SHPO, all consulting parties, and the general public of its findings, provide the SHPO and all consulting parties with supporting documentation pursuant to 36 C.F.R. § 800.11(e), make supporting documentation on the finding available to the general public upon request, and maintain a record of the finding. The supporting documentation is recorded below:

*Summary of documentation requirements for historic properties affected:*

- 1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;
- 2) A description of the steps taken to identify historic properties;
- 3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;
- 4) A description of the undertaking's effects on historic properties;
- 5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize, or mitigate adverse effects; and
- 6) Copies of summaries of any views provided by consulting parties and the public.

### **Finding of Adverse Effect**

If the Federal agency or its delegatee proposes a finding of adverse effect, then the Federal agency or its delegatee shall proceed to resolve the adverse effects.

### **STEP 4: RESOLVING ADVERSE EFFECTS**

When the Federal agency or its delegatee proposes a finding of adverse effect, then the Federal agency or its delegatee shall:

- a) Continue consultation to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties pursuant to 36 C.F.R. § 800.6.
- b) Notify the Council of the finding, provide the Council with documentation specified under 36 C.F.R. § 800.11(e), and, where applicable, invite the Council to participate in consultation.
- c) Assuming there is agreement, execute a memorandum of agreement (MOA) that establishes how the adverse effects will be resolved, and ask the SHPO, and any invited signatories or concurring parties to sign the MOA.
- d) Provide a copy of the executed MOA to the Council.

### **SUMMARY**

The best way to reduce the time needed for Section 106 review is for the Federal agency or its delegatee and the applicants for funding or licensing to plan their projects so as to avoid adverse effects on historic properties. This can be done if the Federal agency or its delegatee its applicant identify all historic properties or important archaeological sites at the beginning of project planning, use The Secretary of the Interior's Standards for Historic Preservation Projects as a guide to designing project that will affect historic properties, and contact the SHPO before reaching any final decisions on project design.

Questions should be directed to the Division of Historic Preservation and Archaeology ("DHPA") at (317) 232-1646 or by writing to the DHPA at the Indiana Department of Natural Resources, 402 West Washington Street, Room W274, Indianapolis, Indiana 46204.